STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALBANESE READY MIX, INC.	:	DECISION
for Revision of Determinations or for Refunds of Sales Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1977 through August 31, 1977 and June 1, 1980 through November 30, 1984.	:	

Petitioner, Albanese Ready Mix, Inc., Jamesville Apulia Road, Jamesville, New York 13078, filed an exception to the determination of the Administrative Law Judge issued on November 10, 1988 with respect to its petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1977 through August 31, 1977 and June 1, 1980 through November 30, 1984 (File No. 803126). Petitioner appeared by Tisdell, Moore & Walter, Esqs. (Robert L. Tisdell, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

On exception petitioner resubmitted the brief it had submitted to the Administrative Law Judge. The Division of Taxation also relied on its letter brief submitted to the Administrative Law Judge. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation correctly determined additional sales and use taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Albanese Ready Mix, Inc., was engaged in the sale of concrete.

On January 10, 1986, as the result of a field audit, the Division of Taxation issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the periods June 1, 1977 through August 31, 1977 and June 1, 1980 through February 28, 1983 for taxes due of$18,350.18, plus penalty and interest of $17,071.37, for a total amount due of $35,421.55. A second notice was issued on the same date for the period March 1, 1983 through November 30, 1984 for taxes due of $9,718.16, plus penalty and interest of $4,232.99, for a total of $13,951.15.

Petitioner maintained incomplete and inadequate books and records for audit. The sales invoices and purchase invoices were incomplete and there was no sales journal. Petitioner's accountant determined gross sales as recorded in the general ledger by reference to bank deposit records. There were no records showing petitioner's method of determining taxable sales. Moreover, petitioner did not file any sales tax returns for the period June 1, 1980 through August 31, 1982. The return for the period June 1, 1977 through August 31, 1977 was filed on November 4, 1983 and therefore was included in the audit period.

On audit, the Division reviewed available sales invoices for the entire period under audit. Those invoices on which no sales tax was charged were compared with exemption certificates on file. This procedure resulted in disallowed nontaxable sales of $94,519.31 and tax due thereon of $6,616.36. The Division next deducted all nontaxable sales per the sales invoices from gross sales shown in the general ledger to arrive at total taxable sales of $639,569.00. Petitioner had reported taxable sales of $373,893.00, leaving additional taxable sales of $265,675.00 with tax due thereon of $18,597.32. Purchase invoices were reviewed for the period December 1, 1983 through November 30, 1984. These invoices revealed that petitioner failed to pay sales or use tax on purchases of recurring expense items amounting to $12,989.90. Since petitioner's purchase records were incomplete, a margin of error of 2.5 percent was computed based on gross sales for the same period ($12,989.90 divided by $512,043.00), and was used to estimate taxable expense purchases for the rest of the audit period. The total tax due on expense purchases was

$1,728.87 ($24,698.07 at 7%). The acquisition of fixed assets was reviewed in detail and resulted in taxes due of $1,125.79. This amount is not in dispute.

Upon examination of the sales invoices, the Division did not consider transportation charges for delivery of concrete as part of the taxable receipt if such charge was separately stated on the invoice to the customer. If a transportation charge was not shown on an invoice, the total receipt was deemed taxable. Additionally, the Division did not consider transportation charges on those sales for which invoices were not available.

On January 30, 1986, petitioner filed a Tax Amnesty Application and remitted payment of $22,671.84. The payment was allocated as follows:

Notice No.	Tax Assessed	Tax Paid under Amnesty	Interest Paid under Amnesty	Total Payment
S860110121C	$18,350.18	$12,000.00	$ 6,192.71	$18,192.71
S860110122C	9,718.16[1]	3,000.00	1,479.13	4,479.13
		$15,000.00[2]	$ 7,671.84	$22,671.84

Petitioner obtained copies of transactions in its bank account with Lincoln First Bank, N.A. for the months of September 1983, October 1983 and November 1983. The records revealed that receipts totaling $3,542.50 belonging to Albanese Transport, Inc., a related corporation, were deposited in petitioner's bank account. Petitioner did not request the bank's records for other periods because of the cost. Petitioner did not file amended income tax returns or sales tax returns for the misapplication of funds between related corporations.

The Division assessed tax on sales of $2,145.20 as part of disallowed nontaxable sales where the invoice indicated that sales tax was properly charged to the customer. As a result, the disallowed nontaxable sales were overstated by that amount.

Petitioner submitted four farmers' exemption certificates covering disallowed nontaxable sales of $16,352.10. The Division did not accept these certificates because the certificates state

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[1]The actual tax assessed on the notice was $15,143.46. However, tax credits were due in the periods ending August 31, 1983 and May 31, 1984 totaling $5,425.30. Also, interest credit of $1,481.61 was due on the overpayments.

[2]Petitioner's amnesty application was submitted on the tax amount of $21,906.91 ($15,000.00 + credits of $6,906.91).

that the exemption for farmers does not apply to purchases of building materials and gives the specific example of cement as a taxable purchase on the back of the certificate. Petitioner also produced signed statements from two contractors indicating that the purchases made from petitioner amounting to $30,994.32 during the audit period were tax exempt. These statements were rejected as they were not proper exemption certificates. All of the foregoing documents were signed in October and November 1985.

Counsel for the Division conceded that petitioner is entitled to a credit of $2,415.75 for an overpayment made in 1977.

OPINION

The Administrative Law Judge concluded that petitioner's books and records were incomplete and inadequate so that the Division of Taxation was authorized to estimate the sales tax due utilizing external indices. The Administrative Law Judge also held that the audit performed was reasonably calculated to estimate the tax due. The Administrative Law Judge did make certain adjustments to the audit based on proof submitted by petitioner at the hearing.

On exception petitioner does not challenge the Division's right to estimate tax, but claims that the method utilized was not reasonable and that certain additional modifications are necessary to make the audit reasonable. These modifications were rejected by the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge. We address each point raised by petitioner below.

First, petitioner asserts that it is entitled to a reduction in taxable sales in the amount of $45,049.20, representing deposits in its bank account petitioner claims actually belonged to Albanese Transport, Inc. The Administrative Law Judge allowed petitioner a reduction of $3,452.50, based on the bank records petitioner supplied for three months of the audit period indicating the deposit of receipts from the related corporation. Petitioner argues that these records indicate that 4.56 percent of the total deposits in petitioner's bank account during the three month period were receipts of Albanese Transport, Inc. Petitioner asks us to estimate

deposits attributable to Albanese Transport, Inc. for the entire audit period by applying this 4.56 percent to petitioner's audited taxable sales. Petitioner supports its request by arguing that since the Division is allowed to determine tax based on test periods, it should be allowed to reduce its tax liability based on test periods. Petitioner's argument fails to appreciate the source of the Division's authority to utilize test periods.

The Division's right to resort to test periods and external indices to estimate taxes arises from the taxpayer's failure to maintain records adequate to determine that tax has been charged on all taxable items (Matter of Licata v. Chu, 64 NY2d 874, 487 NYS2d 552). Thus, estimates by the Division of a taxpayer's liability are acceptable on the principle that "where the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required." (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 228, 402 NYS2d 74, lv. denied 44 NY2d 645, 406 NYS2d 1025).

Petitioner's position would reverse this principle by allowing a vendor who fails to keep adequate and complete books and records to estimate its tax liability. We find no authority for such a benefit in the Tax Law or the cases thereunder (Matter of Raemart Drugs, Inc., Tax Appeals Tribunal, July 8, 1988).

The applicable rule is that the petitioner has the burden to prove by clear and convincing evidence, that the method of audit used or the amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858, 859, 446 NYS2d 451). Petitioner cannot sustain this burden with its proposed estimate procedure. Accordingly, we conclude that petitioner is entitled to no more of an adjustment for deposits attributable to Albanese Transport, Inc. than was allowed by the Administrative Law Judge.

Petitioner's next point is that it is entitled to a $30,994.32 reduction in the amount of taxable sales for sales the petitioner claims were tax exempt. The only proof offered by petitioner with respect to these sales were two signed statements which read:

"TO WHOM IT MAY CONCERN

PLEASE BE ADVISED THAT ALL SALES BY
ALBANESE READY MIX INC. TO ME BETWEEN

JUNE 1, 1980 AND NOVEMBER 30, 1980 WOULD BE TAX-EXEMPT AND NOT SUBJECT TO NEW YORK STATE SALES AND USE TAX."

The signatures on these two statements correspond to the names on invoices held taxable by the auditor. These statements were signed in October and November of 1985, five years after the sales took place.

Clearly this statement is not ". . . a certificate in such form as the (Commissioner of Taxation and Finance) may prescribe . . ." (Tax Law § 1132[c]). As a result, petitioner retains the burden of overcoming the presumption, created by section 1132(c) of the Tax Law, that the receipts are taxable. We conclude that this statement, without any explanation as to the specific purchases they cover and the nature of the exemption claimed, does not begin to rebut the presumption created by section 1132(c) of the Tax Law (see, Matter of On the Rox Liquors, Ltd v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503).

With respect to exempt sales, petitioner also argues that it should be allowed to estimate a percentage of exempt sales throughout the audit period based on the exemption certificates that were produced. We reject this estimate for the reasons stated above with respect to the deposit of Albanese Transport, Inc. receipts.

Petitioner next asserts that the auditor erred in assessing tax throughout the audit period based on the purchase of tires found in the purchase invoices reviewed for the period December 1, 1983 through November 30, 1984. Petitioner claims that tires were not a recurring expense and that the auditor erred in including them in this category.

By asserting that tires were not purchased on a recurring basis throughout the audit period, petitioner has not established that it did not purchase other recurring expense items in the other portions of the audit period. In any event, it was the petitioner's failure to maintain complete purchase records which prevented the auditor from reviewing the invoices for the entire audit period. In such a circumstance, exactness in the assessment is not required (Matter of Meyer v. State Tax Commn., supra).

Petitioner next argues that it should be allowed a charge of $9.00 per yard of concrete as a nontaxable transportation charge, even on those invoices where a transportation charge was not separately stated, because "it is a known fact that concrete must be transported" (petitioner's exception). The Administrative Law Judge did not allow a reduction for transportation charges in those instances where the invoices supplied did not separately state a transportation charge or where no invoice was supplied.

Section 1101(b)(3) of the Tax Law excludes the cost of transportation from the definition of "receipt", where such cost is separately stated on the bill rendered to the purchaser. Since the Tax Law explicitly limits the exclusion to those instances where the charge is separately stated on the bill, we affirm the Administrative Law Judge on this issue.

Petitioner next asserts that it is entitled to a credit for a bad debt. Petitioner's accountant testified that petitioner had charged off on its 1977 Federal income tax return a debt in the amount of $1,177.65 that was attributable to the audit period. Petitioner claims it is entitled to a credit in this amount against the tax asserted to be due. The Administrative Law Judge denied the credit on the basis that petitioner's claim at the hearing was not a timely application under section 1139(e) of the Tax Law. We agree.

Section 1132(e) of the Tax Law authorizes the Division of Taxation to provide, by regulation, for the exclusion from taxable receipts of amounts determined to be uncollectible. The period of limitation for a vendor to claim a credit or a refund for such a bad debt is three years from the time the tax was payable to the Division of Taxation (Tax Law § 1139[e]). Since the tax at issue could not have been payable to the Division any later than 1977, the year the debt was charged off on petitioner's Federal income tax return, petitioner's claim first made at the hearing held in 1988 was clearly not within the three year period of limitation.

Petitioner's final claim is that it has been required by this audit to keep books and records for more than three years. We note first that it was petitioner's complete failure to file sales tax returns for the period June 1, 1980 through August 31, 1982, and its filing of the return for the quarter ending August 31, 1977 on November 4, 1983 that allowed the Division to issue a Notice

of Determination on January 10, 1986 for these periods (Tax Law § 1147[b]). Thus, it is petitioner's own failures that have placed it in the position of needing books and records that would be more than three years old in order to prove the assessment to be erroneous. Further, the Division of Taxation's regulations clearly advise the public that the three year period that records are required to be kept by section 1135(d) of the Tax Law runs from the date the return is filed (20 NYCRR 533.2[a][3]). Therefore, petitioner was on notice that its failure and delay in filing returns would result in the consequences here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Albanese Ready Mix, Inc. is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Albanese Ready Mix, Inc. is granted to the extent indicated in Conclusions of Law "C", "E", and "F" of the Administrative Law Judge's determination, but is in all other respects denied; and

4. The notices of determination issued January 10, 1986 shall be modified accordingly by the Division of Taxation, but are in all other respects sustained.

DATED: Troy, New York
June 15, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner